80-806

Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1980

In Re Joseph L. Drociak

Joseph L. Drociak, Appellant

On Appeal from the Supreme Court
of New Hampshire

Jurisdictional Statement

Jon Groetzinger, Jr., Esq.
100 Federal Street
Boston, MA 02110
(617) 426-3904

Counsel of Record
for the Appellant

and

Michael G. Gfroerer, Esq.
Barto and Gfroerer
6 Loudon Road
Concord, N.H. 03301

November 17, 1980

No. _____

In the

Supreme Court of the United States

October Term, 1980

In Re Joseph L. Drociak

Joseph L. Drociak, Appellant

On Appeal from the Supreme Court

of New Hampshire

Jurisdictional Statement

Joseph L. Drociak, the appellant, appeals from the final decision of the Supreme Court of New Hampshire, dated August 21, 1980, and prior orders relating to the appellant, which denied appellant's admission to the New Hampshire Bar, despite his challenge that, on its face and as applied to him, the residency requirement of RSA 311:2 and N.H. Supreme Court Rule 15 violated the Privileges and Immunities Clause of Article IV and that the Court's action

infringed upon his rights to equal protection and due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether in its exclusion of the appellant from the New Hampshire Bar, based solely on his lack of New Hampshire residence, the residency requirement of RSA 311:2 and N.H. Supreme Court Rule 15, on its face and as applied to him, violates the Privileges and Immunities Clause of Article IV (as applied to the States through the Fourteenth Amendment) and appellant's rights to equal protection and due process of law under the Fourteenth Amendment of the Constitution of the United States.

2. Whether in failing to notify the

appellant in a timely manner of a change in the period within which he had to take the oath of office after successfully passing the State's bar examination, the Supreme Court of New Hampshire denied the appellant his rights to equal protection and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States .

LIST OF ALL PARTIES

Joseph L. Drociak, Esq., Appellant
7627 So. Western Avenue
Los Angeles CA 90047

State of New Hampshire, Appellee
Office of the N.H. Attorney General
State House Annex
Concord NH 03301

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ORDERS DELIVERED IN COURT BELOW

None of the orders of the Supreme Court of New Hampshire relating to the appellant were reported.

Copies of the orders are provided in the Appendix, pp.28-33, #1-6.

JURISDICTIONAL STATEMENT

In reply to appellant's request to take the oath of admission, the initial order of the Supreme Court of New Hampshire, dated May 21, 1962, allowed the appellant to be admitted to the New Hampshire Bar on June 5, 1962, only if he was a bona fide resident of New Hampshire at that time. (Appendix, p. 28, #1). Since he was not then a resident, he did not so appear to take the oath.

The appellant again requested

admission in September, 1977. The Supreme Court of New Hampshire denied the request in a letter of September 16, 1977. (Appendix, p. 40, #11 & p. 29, #2).

The appellant promptly requested that the Court inform him of the grounds for the denial of admission. (Appendix, p. 42, #12). In reply he was sent a form entitled "In re Petitions for admission to the New Hampshire Bar on Motion", informing him, inter alia, that all petitions for admission on motion filed since June 3, 1977, would be considered "probably in late summer or early fall of 1978". (Appendix, p. 29, #3). [Since about June, 1977, the Supreme Court of New Hampshire has not admitted out-of-state attorneys on motion.]

When he had heard nothing from the Court by November, 1978, the appellant retained counsel, who submitted a Motion to Take Oaths, dated October 12,

1979, with Affidavits, Exhibits and a Memorandum of Law. Prior to a decision on the Motion, appellant's counsel filed a Supplementary Memorandum of Law, dated February 22, 1980.

By letter of May 2, 1980, the Court denied appellant's request to take the oath of admission. (Appendix, p. 31, #4).

Appellant's counsel submitted a Motion for Clarification and Reconsideration, dated May 20, 1980. The Court responded by letter of June 13, 1980 (Appendix, p. 32, #5).

Following the suggestion of the Clerk of Court, appellant's counsel submitted a letter of June 20, 1980, elaborating upon appellant's request for reconsideration. (Appendix, p. 42, #13). The Court, however, by letter of August 21, 1980, stated its intent to take no further action. (Appendix, p. 33, #6).

This appeal is being docketed in

this Court within 90 days from the August 21, 1980, final order, Notice of Appeal having been filed with the Supreme Court of New Hampshire on November 13, 1980. (Appendix, p. 33, #7). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (2).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitutional Provisions:

Article IV, Section 2, Clause 1, United States Constitution.

Fourteenth Amendment, Section 1, United States Constitution.

Statutes:

Chapter 311, Sec. 2, N.H. Revised Statutes Annotated (1961).

Chapter 311, Sec. 7, N.H. revised

Statutes Annotated (1980).

Rules:

N.H. Supreme Court Rule 15 (1961) and its successor Rule 42.

****

[The text of these constitutional provisions, statutes and rules are set forth in the Appendix, pp. 47+, #15.]

STATEMENT OF THE CASE

While the Supreme Court of New Hampshire gave no response to the appellant's suggestion that a Stipulation of Facts be drafted for purposes of this appeal (Appendix, p. 42, #13), the relevant facts appear undisputed and may be fairly summarized as follows:

1. Mr. Drociak was born and raised in Manchester, New Hampshire. He went to both high school and college

there and left only for graduate study at George Washington University and law school at Georgetown University Law Center between 1957 and 1961.

2. He returned to his home in Manchester about the beginning of June, 1961, to study for the New Hampshire bar examination, which he took on June 21-23, 1961.

3. In about July, 1961, he went to California on vacation and stayed at his aunt and uncle's house. When he heard in August that he had passed the examination, he telephoned Mr. George Shovan, the then-Clerk of the Supreme Court of New Hampshire, and explained that he lacked the funds to fly back to New Hampshire from California for the August 30, 1961, swearing-in ceremony.

4. Mr. Shovan replied, in effect, that he should not be concerned, that he could return at any time and take

the oath, i.e. that there was no statute of limitations on the right to be sworn-in. (Appendix, Clerk's Affidavit, p. 35, #8, para. 7). Relying upon Mr. Shovan's assurance, Mr. Drociak remained in California.

5. In May, 1962, he requested an opportunity to take the New Hampshire oath of office since he was contemplating moving back to New Hampshire. (Appendix, p. 39, #9).

6. Mr. Shovan informed him that he could take the oath in June, 1962, but only if he was a bona fide resident of New Hampshire on that date. (Appendix, p. 28, #1).

7. Since he was not a New Hampshire resident in June, 1962, and relying upon Mr. Shovan's statement that there was no statute of limitations on his right to be sworn in, Mr. Drociak informed the Court that he would not

appear at the June, 1962, Court session. At this time he was qualified for admission to the New Hampshire Bar in every respect except residency.

8. Mr. Drociak again applied to take the oath of office in September, 1977 since he had friends, family and potential legal business in New Hampshire. (Appendix, p. 40, #11). At this time he was still a California resident. He had been admitted to the California Bar in 1964, and has to the present continued to practice in California. [While there was some question as to statements made by the appellant in his application to take the California Bar examination, he has explained the statements to the Supreme Court of New Hampshire. Further, his file was referred to the New Hampshire Committee on Character and Fitness in November, 1977, and he heard no objection to his character. (Appendix,

p. 47, #14). He is and always has been a member in good standing of the California Bar.]

9. His September, 1977 request was denied without any stated grounds. (Appendix, p. 29, #2). When he promptly wrote the Court, requesting reasons for the denial, he merely was sent a form which stated, inter alia, that all petitions for admission on motion would be acted upon probably by late summer or early fall of 1978. (Appendix, pp. 29, #3).

10. When he had heard nothing by November, 1978, he retained counsel who filed a Motion to Take Oaths, various affidavits and other exhibits, and a Memorandum of Law in October, 1979, and a Supplementary Memorandum of Law in February, 1980. It was in these pleadings and papers that the appellant raised the unconstitutionality of the residency requirement of RSA 311:2 and N.H. Supreme Court Rule 15 on its face and as applied

to him.

11. In a May 2, 1980, letter the Court indicated to the appellant for the first time that it did not approve requests to take the oath of admission "where several years have intervened between passing the bar examination and the time an applicant wishes to take the oath." (Appendix, p. 31, #4). This statement was in direct conflict with the statement of the former Court Clerk who had indicated that there was no such time limit.

12. Also about this time the Court issued its first public promulgation of the new policy in amending N.H. Supreme Court Rule 42 (the successor to Rule 15) to provide that one must take the oath of office within two years of passing the bar examination lest he otherwise be required to retake the examination. The amendment, however, was

not applied to the appellant's case. (Appendix, p. 32, #5).

13. Consequently, appellant's counsel submitted a Motion for Clarification and Reconsideration in May, 1980, and a letter in June, 1980, in which he raised the question whether such action by the Court violated the appellant's rights to equal protection and due process of law. He called the Court's attention to the fact that the Court until this time had never informed the appellant of the change in policy in taking the oath of office, of the consequences of his failure to do so, or of the reasons for the change. Counsel further called the Court's attention to the vagueness of the requirement that one take the oath within "several years" after passing the bar examination. Additionally, he requested a hearing on the matter.

14. By its letter of August 21, 1980, the Court indicated its intention to take no further action in the matter, which decision prompted this appeal.

THE QUESTIONS ARE SUBSTANTIAL

I. Residency Requirement.

A. RSA 311:2 and N.H. Supreme Court Rule 15 are Unconstitutional on Their Face.

1. Jurisdictional Conflict.

The constitutionality of residency requirements such as those found in RSA 311:2 and N.H. Supreme Court Rule 15 have recently created a serious jurisdictional conflict which has deepened in recent months.

Until November, 1979, most courts had held that residency requirements for admission to the bar were not unconstitutional per se, i.e.

that such requirements constituted appropriate means by which States could investigate the moral character and fitness of the attorneys they were admitting. The only question was typically whether or not the duration of the residency requirement was reasonable. Webster v. Wofford, 321 F.Supp. 1259 (DC GA 1970); Suffling v. Bondurant, 339 F.Supp. 257 (DC NM 1972), aff'd 409 U.S. 1020, 34 L.ed. 2d 312. The longer one was required to remain a resident prior to admission, the less likely the requirement was to stand constitutional scrutiny. Golden v. State Bd. of Law Examiners, 452 F.Supp. 1082, at 1086 (DC Md 1978), app. dism. 614 F. 2d 943.

The situation changed, however, in November, 1979, when the New York Court of Appeals unanimously struck down the state's six-month residency requirement for bar applicants as

violative of the Privileges and Immunities Clause of the U.S. Constitution. Matter of Gordon, 48 NY 2d 266 (1979). A significant aspect of the decision was that under the Privileges and Immunities Clause the duration of the residency requirement, however long or short, was not a basis for the holding. In other words, any denial of admission to otherwise qualified attorneys,

"based solely on their state of residence...works an unconstitutional discrimination against nonresidents." 48 NY 2d at 275.

The Court reached this result based in large part on Hicklin v. Orbeck, 437 U.S. 518, 57 L.ed. 2d 397 (1978), which laid down a tough test for determining whether a state's discrimination against nonresidents can be justified. See also Troyer v. Town of Babylon, 483 F. Supp. 1135, at 1140 (DC

NY 1980) which followed the Gordon decision.

Hicklin, supra, has been subsequently supported by other cases that have discouraged states' attempts to curb the free flow of commerce among the states, especially if protectionist motives were indicated. See Philadelphia v. New Jersey, 437 U.S. 617, 57 L.ed. 2d 475 (1978).

While the New York Court acknowledged the State's interest in assuring the competency and character of attorneys in the State, it found a number of less drastic and constitutionally permissible means of meeting this objective.

In May of 1980 a Federal District Court for Wisconsin examined the constitutionality of the Wisconsin statute requiring that an applicant for admission to the Bar be a resident at the

time of admission. Canfield v. Wis. Bd. of Attys. Professional Comp., 490 F.Supp. 1286 (DC Wis 1980).

While the Court found the Gordon decision persuasive on its merits, it felt bound by Wilson v. Wilson, 416 F. Supp. 984 (DC Ore. 1976), which upheld Oregon's requirement that an applicant be a resident at the time of admission since the Wilson case had been given summary affirmance by this Court at 430 U.S. 925, 51 L.ed.2d 768 (1977). The Canfield Court stated:

"A summary affirmance by the Supreme Court of the United States is a disposition on the merits and lower courts are bound by it." 490 F.Supp. at 1289.

The Canfield Court believed that the challenge to a residency requirement as violative of the Privileges and Immunities issue had been raised and

rejected by the summary affirmance in Wilson, supra. It thus speculated as to why the Gordon Court did not feel similarly bound by Wilson, supra. 490 F.Supp. at 1290.

The Supreme Court of Alaska was not as puzzled by the Gordon holding as was the Canfield Court. It adopted the Gordon rationale as recently as October 16, 1980. Sheley v. Alaska Bar Assn., (49 U.S. L.W. 2273, 10/28/80). The Court therein struck down the state's 30-day residency requirement for admission to the Alaskan Bar as being in violation of the Privileges and Immunities Clause.

Clearly the need exists to clarify the meaning of Hicklin v. Orbeck, supra, and the summary affirmance of the Wilson, supra. The time has come to determine wnether a residency requirement for purposes of admission to a state bar violates the Privileges and Immunities

Clause of Article IV, Sec. 2, Cl. 1, applicable to the States through the Fourteenth Amendment, Sec. 1.

2. Broad Application of Question. Any determination of the constitutionality of a state bar residency requirement extends well beyond the fate of Mr. Drociak. Given the increasingly frequent movement of lawyers and other professionals across state borders and the growth of "national" law and other professional firms, time will not bury the issue. As seen in the recent cases mentioned above, the conflict among jurisdictions is increasing rapidly.

B. Unconstitutional Application of RSA 311:2 and N.H. Supreme Court Rule 15.

Even if RSA 311:2 and N.H. Supreme Court Rule 15 were not found to violate the Privileges and Immunities Clause, they were applied to the appellant so as to violate his rights to

equal protection and due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court of New Hampshire has denied his admission to the Bar even though he had actually met the residency requirement. Both statute and rule require only that he be or file a statement of intent to become a New Hampshire resident on application to take the bar examination. He in fact was a New Hampshire resident both before and after applying to take the bar examination.

RSA 311:2 states, inter alia, that:

"Any citizen...on application to the Supreme Court shall be admitted to practice as an attorney." (Underlining added).

The Supreme Court of New Hampshire has construed the statute through Rule 15 to mean that any New

Hampshire resident or one who files a statement of intention to become a resident "shall be eligible to apply for examination...." (Underlining added).

Thus under both statute and the rule, the only time New Hampshire residency is in issue is upon application to take the bar examination.

Once one establishes New Hampshire residency or files an intent to become a resident upon application to take the examination, nothing in the law requires that he remain a New Hampshire resident for one year, six months or, as the Court required herein, until he takes the oath of office.

Mr. Drociak was a New Hampshire resident before, during and even after taking the bar examination in 1961, thereby meeting the residency requirement. Nevertheless, the Supreme Court of New Hampshire ignored the

statute and its own rule and required the appellant to be a New Hampshire resident on the date he was sworn in, thereby depriving him of the right to take the oath, a right which he had already attained.

As the following scenario shows, application of the statute and rule so as to require an applicant to be a New Hampshire resident on the date he takes the oath of admission does not assist the State in its lawful power to ensure the proper character and fitness of New Hampshire lawyers:

Lawyer A is a nonresident until the very date of the swearing-in ceremony. Within a week after the ceremony he leaves New Hampshire to establish residency elsewhere. While his prolonged absence from the State prior to the ceremony in no way assists the bar authorities in determining his character

and fitness to practice law, he is qualified to be admitted.

Lawyer B, on the other hand, has lived in New Hampshire all of his life; his character and fitness are well-known to the community in which he lives. He passes the bar examination, but the day before the oath of admission is to be administered, his employer requires him to move to another state. The Court's application of the statute and rule, would disquality him for admission.

Under such circumstances what possible rational connection exists between the residency requirement and the State's interest in licensing only competent attorneys of good moral character? Schware v. Bar Examiners, 353 U.S. 232, at 239, 1 L.ed. 21 796, at

801-802 (1957).

II. Lack of Notice of Time Change.

Notice is the most fundamental right afforded by the equal protection and due process of law clause of the Fourteenth Amendment. Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, at 123, 70 L.ed. 494, at 497 (1926).

While the necessity for procedures such as the right to confront one's accusers and to cross-examine witnesses may vary from case to case depending upon the circumstances, there is virtually no instance in which a State may deprive an individual of his rights to life, liberty or property without at least notice thereof. Annotation, 98 L.ed. 851, at 855.

It has been recognized that the right of an attorney to practice his profession is not a matter of grace, but

of right for one who is qualified by his learning and his moral character. Baird v. St. Bar of Arizona, 401 U.S. 1, at 8, 27 L.ed. 2d 639, at 648 (1971). Moreover, denial of that right can only occur after the State has afforded an applicant procedural due process. Willner v. Committee on Character & Fitness, 373 U.S. 96 at 102, 10 L.ed. 2d 224 at 229 (1963), mot. for clar. den. 375 U.S. 950.

In the case of Mr. Drociak, he had understood from the former Clerk of the Supreme Court of New Hampshire that he could return at any time without limitation to take the oath of office, provided he was a New Hampshire resident at the time.(Appendix, Clerk's Affidavit, p. 35, #8, para. 7).

However, at some point between the time at which the former Clerk made this statement and the Court's letter of May 2, 1980, the Court changed its policy

so that requests to take the oath of admission were not approved "where several years have intervened between passing the bar examination and the time an applicant wishes to take the oath." (Appendix, pp. 31, #4).

The Court never notified the appellant in a timely manner of this change nor of the consequences of his failure to take the oath within "several years". By the time the Court did notify him of the change, it further informed him that he had already been precluded by the passage of "several years" from taking the oath. At this time the Court was no longer admitting out-of-state attorneys on motion. Consequently, it indicated that his only alternative would be to retake the bar examination, an option which presented considerable financial and practical hardship for him.

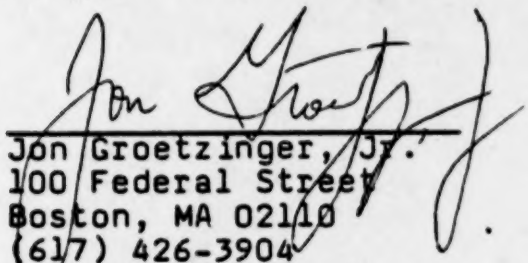
Even if the Court had notified

him of the change in timely fashion, the requirement that he take the oath within "several years" of having passed the bar examination was so vague as to prevent the appellant or any other reasonable person from determining the time within which to act. The vices of such due process vagueness have been previously recognized. Cramp v. Board of Public Instruction, 368 U.S. 278, 7 L.ed. 2d 285 (1961); Law Students Research Council v. Wadmond, 401 U.S. 154, 27 L.ed. 2d 749 (1971), (Mr. Justice Marshall's dissent).

III. Conclusion.

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,



Jon Groetzinger, Jr.
100 Federal Street
Boston, MA 02110
(617) 426-3904
Counsel of Record
for the Appellant
and
Michael G. Gfroerer
Barto and Gfroerer
6 Loudon Road
Concord, N.H. 03301

APPENDIX

N.H. SUPREME COURT ORDERS [LETTERS] ON APPEAL:

#1

[Letterhead of Clerk of N.H. Supr. Court]

1962
May 21

Mr. Joseph L. Drociak
2325 Ocean View Avenue
Los Angeles 57, California

Dear Mr. Drociak:

In accordance with our telephone conversation of May 11, 1962, you may be admitted to the bar of this state when the Court next convenes in regular session, June 5, at 10 A.M., provided you are a bona fide resident of this state on that date.

On the question of residence, this office has a communication dated May 16, 1962 from the Assistant Secretary of the Committee of Bar Examiners for the State Bar of California, disclosing that you informed that Committee that "After graduation from law school I came to California and have taken permanent employment as a claims representative with the Aetna Ins. Co. Have also rented an apartment and have given up N.H. residence."

You informed me in your telephone conversation that you have continued to maintain your domicile in New Hampshire and that you presently have a domicile here.

Will you kindly explain by return air mail this apparent conflict on the question of your bona fide intention of making New Hampshire your home.

Very truly yours,

[George O. Shovan]

GOS/R

****

#2

[Letterhead of N.H. Supr. Court]

1977
September 16

Joseph L. Drociak, Esq.
7627 South Western Avenue
Los Angeles, California 90047

Dear Mr. Drociak:

Your request by letter dated "September 1977" that you be admitted to the New Hampshire bar by reason of having passed the New Hampshire bar examination in 1961 has been denied.

Very truly yours,
[George S. Pappagianis]
George S. Pappagianis

GSP/drc

****

#3

STATE OF NEW HAMPSHIRE
SUPREME COURT OF NEW HAMPSHIRE

In re Petitions for Admission to the New Hampshire Bar on Motion

On June 3, 1977, the Supreme Court of New Hampshire established a

Committee on Character and Fitness and prescribed that each petitioner for admission to the bar must pay one hundred dollars ($100) for the Committe[e]'s use in its investigation of the petitioner's character and fitness.

All petitions for admission on motion filed since June 3, 1977, will be considered and acted upon by the court next year, probably in late summer or early fall.

The sum of the fees payable to this office by a petitioner for admission on motion is $375, of which $250 is retained by the state and $125 is forwarded to the National Conference of Bar Examiners.

A new petition-for-admission-on-motion form and a questionnaire are being processed for final review. Your name and address are being retained in our files as one who is to receive the new form, the questionnaire, and any other pertinent material, and we will send them to you as soon as they are available.

****

#4

[Letterhead of N.H. Supr. Court]

May 2, 1980

Jon Groetzinger, Jr., Esq.
1 North Main Street
Derry, N.H. 03038

Michael G. Gfroerer, Esq.
Barto and Gfroerer
6 Loudon Road
P.O. Box 468
Concord, N.H. 03301

Re: No. 79-323 In re Joseph L. Drociak

Gentlemen:

The Court does not approve requests to take the oath of admission where several years have intervened between passing the bar examination and the time an applicant wishes to take the oath. The Court is reviewing its policy on admission on motion to the Bar.

Should Mr. Drociak desire to become admitted by taking the bar examination this summer, the Court will permit him to apply as late as May 30, 1980. Enclosed is a bar examination application, together with an information sheet. The fee for the Character and Fitness investigation will be waived, but the exam fee of $75. must be submitted at the time his application is filed.

Sincerely,
[Ralph H. Wood]
Ralph H. Wood

rhw/cab
Enclosure

****

#5

[Letterhead of N.H. Supr. Court]

1980
June 13

Jon Groetzinger, Jr., Esq.
100 Federal Street
Boston, MA 02110

Michael G. Gfroerer, Esq.
Barto and Gfroerer
6 Loudon Road, P.O. Box 468
Concord, NH 03301

Re: No. 79-323 In re Joseph L. Drociak

Gentlemen:

This will respond to your "Motion" dated May 20, 1980. My letter of May 2, 1980 was the equivalent of an order of the court. It was not based upon the recent change to Rule 42 but rather upon past practice of the court in requiring re-examination whenever several years have passed following the taking of the examination without the applicant's having established residency and taken the oath.

Very truly yours,
[Ralph H. Wood]
Ralph H. Wood

RHW/jd

****

#6
[Letterhead of the N.H. Supr. Court]

August 21, 1980

Jon Groetzinger, Jr., Esq.
100 Federal Street
Boston, Massachusetts 02110

Re: 79-323 In re Joseph L. Drociak

Dear Mr. Groetzinger:

The Court has instructed me to inform you that it has reviewed the contents of your letter of June 20, 1980 addressed to the Clerk and that it intends to take no further action in this matter.

Very truly yours,
[Ralph H. Wood]
Ralph H. Wood

rhw/cab
cc: Michael G. Gfroerer, Esquire

****

NOTICE OF APPEAL:

#7
In the Supreme Court of the
State of New Hampshire

In re Joseph L. Drociak No. 79-323

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Joseph L. Drociak, the appellant above-named, hereby appeals to the Supreme Court of the United States from

the final decree of the Supreme Court of the State of New Hampshire, dismissing his motions to be admitted to the New Hampshire Bar, entered on August 21, 1980, and all prior orders relating to the appellant.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257 (2).

[Jon Groetzinger, Jr.]
Jon Groetzinger, Jr.
and
Michael G. Gfroerer
Counsel for Appellant

****

In the Supreme Court of the
State of New Hampshire

In re Joseph L. Drociak No. 79-323

PROOF OF SERVICE AND
NOTARIZED STATEMENT OF MAILING

I hereby certify that an original of appellant's Notice of Appeal To The Supreme Court Of The United States was mailed by certified first class mail, postage prepaid, return receipt requested, by me to the Clerk of the Supreme Court of the State of New Hampshire on this 13th day of November, 1980, at the main U.S. Post Office in Post Office Square, Boston, MA.

I further certify that three copies of said Notice and three copies of this Proof of Service were mailed ~~by~~ certified first class mail, postage prepaid, return receipt requested, by me to the Office of the New Hampshire Attorney General, State House Annex,

Concord, N.H. 03301 on this 13th day of November, 1980, at the main U.S. Post Office in Post Office Square, Boston, MA.

To my knowledge said mailings took place within the permitted time, in compliance with U.S. Supreme Court Rules, and were served upon all parties.

[Jon Groetzinger, Jr.]
Jon Groetzinger, Jr.
100 Federal Street
Boston, MA 02110
(617) 426-3904

[Oath, notary signature and seal]

****

OTHER MATERIAL:

#8
Clerk's Affidavit:

AFFIDAVIT

State of New Hampshire)
County of Merrimack)ss:

I, George O. Shovan, being duly sworn, depose and say that:

1. I currently reside on Little Sunapee Road in New London, New Hampshire.

2. I was Clerk of the New Hampshire Supreme Court from May 1, 1933 until February 1, 1970.

3. As Clerk I was responsible for receiving petitions for admission to the bar examination and received one such petition from Joseph L. Drociak on May 11, 1961. Mr. Drociak's petition stated

that he was residing at 315 Manchester Street, Manchester, New Hampshire.

4. On May 15, 1961 I wrote to Mr. Drociak informing him that his application had been approved by the Court, subject to his furnishing a certificate of graduation from law school, which he subsequently supplied.

5. Mr. Drociak took the New Hampshire bar examination on June 21, 22, and 23, 1961 and successfully passed.

6. During a telephone conversation on or about December 4, 1978 with Jon Groetzinger, Jr., Mr. Drociak's attorney, he stated that his client had told him the following, to the effect that:

While in California in August, 1961, Mr. Drociak learned that he had passed the New Hampshire bar examination and telephoned me soon after at the Clerk's office. During the conversation he stated that he was in California and, lacking funds, would find it difficult to return to New Hampshire in time for the August 30, 1961 swearing in ceremony. Thereupon, I told him not to worry, that he could return and be sworn in at any time in the future and that there was no time limit on this right to be sworn in.

7. While I do not remember the specific telephone call from Mr. Drociak, I often received such calls from examinees who had passed the bar examination but who had gone off on a vacation, honeymoon or into the service and were consequently unable to be present to take the oath on the appointed day. I would tell such persons in effect that their absence from a particular

swearing in ceremony did not disqualify them from subsequently taking the oath on the first Tuesday of each month, and that there was no time limit within which to take the oath. I often indicated there was a two-pronged test for admission: 1) qualification (i.e. passing the bar examination) and 2) New Hampshire "citizenship" (this statutory language has been interpreted to mean "residency"). If one was not a New Hampshire resident on the date he or she applied to take the examination, the Court would allow the person to graduate from law school and establish a bona fide residency in New Hampshire. New Hampshire residency must exist on the date the oath was taken. Therefore, were Mr. Drociak currently to become a New Hampshire resident, he could take the oath and be admitted.

8. On August 28, 1961 I wrote to Mr. Drociak informing him as to much of the above, specifically stating in part that:

"if you are unable to be present at that time [i.e. August 30, 1961 at 10 A.M.] you may upon notice to this office be admitted on the first Tuesday of each month at 10 A.M. when the Court holds its regular sessions, provided you are a bona fide resident of this state when you present yourself for admission."

9. Subsequently in a letter to the California Committee of Bar Examiners, dated December 12, 1961, I stated that Mr. Drociak had not yet been admitted to the New Hampshire bar

"for the only reason that he has not qualified as a bona fide resident of this state."

10. On May 21, 1962 I wrote a letter to Mr. Drociak confirming a May 11, 1962 telephone conversation which I had had with him. In the letter I stated that he may be admitted to the New Hampshire bar on June 5, 1962 at 10 A.M.

"provided you are a bona fide resident of this state on that date."

11. In letters dated May 22, 1962 and August 7, 1962 respectively, I informed the California Committee of Bar Examiners that Mr. Drociak maintained a domicile in Manchester, New Hampshire, but was currently a California resident, thereby distinguishing between domicile and residence.

12. This Affidavit is made in conjunction with Mr. Drociak's attempts to be admitted to the New Hampshire bar. Copies of correspondence referred to herein are attached hereto as an exhibit.

[George O. Shovan]
George O. Shovan, Deponent

[Oath and Notary signature and seal-January 16, 1979]

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Appellant's Requests for Admission to the Bar:

#9

2325 Ocean View Ave.
Los Angeles 57, Calif.
May 14, 1962

State of New Hampshire
Supreme Court
Concord, New Hampshire

Dear Mr. Shovan:

Confirming our recent telephone conversation please be advised that I was a successful candidate on the 1961 New Hampshire Bar Examination, however due to my location as a claim representative of the Aetna Casualty & Surety Co. I was unable to be present to take the oath for admission to the Bar.

I am returning to New Hampshire on June 1, and respectfully request that I be permitted to take the oath on [T]uesday, June 5 in open court when the court holds it[']s regular session.

I am a native of Manchester and a domiciliary of New Hampshire having resided in Washington, D.C. while in attendance at Georgetown Law Center and in Los Angeles, Calif. while employed as a claim representative for the Aetna Casualty & Surety Co. I am a registered voter in New Hampshire and have a joint interest in real property located in Manchester.

If any additional information is necessary, please advise.

Thanking you for your cooperation in this matter.

Sincerely yours,
[Joseph L. Drociak]
Joseph L. Drociak

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#10
2325 Ocean View Ave.
Los Angeles 57, Calif.
May 31, 1962

Mr. George O. Shovan
State of New Hampshire Supreme Court
Concord, New Hampshire

Dear Mr. Shovan:

As per our recent telephone conversation, this is to inform you that I shall not be present on June 5 to take the oath as due to my present location I would not qualify as a bona fide resident of New Hampshire at that time.

Thanking you for your cooperation in this matter.

Sincerely yours,
[Joseph L. Drociak]
Joseph L. Drociak

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#11
September 1977

Clerk of the Supreme Court
of New Hampshire
Noble Drive
Concord, New Hampshire 03301

Gentlemen:

Pursuant to our recent telephone

conversation please be advised that I am a native of Manchester and a graduate of the Georgetown Law Center in Washington, D.C. I received my Law degree in June 1961. I successfully completed the New Hampshire State Bar exam in June 1961, however, I was not present that year to be sworn in as a member of the New Hampshire Bar. I discussed this matter at that time with the Clerk of the Supreme Court and was advised that I could be admitted at any time and there was not Statute of Limitation or other bar to my admission.

Relying on that representation, I did not return to New Hampshire to be admitted. Subsequently I took the California Bar examination which I successfully completed and was duly admitted to practise before the California Bar in 1964.

Since that time I have been actively engaged in the practice of Law in Los Angeles. However, I do return to New Hampshire periodically to visit family and friends and would at this time like to be admitted to the New Hampshire Bar and hereby request that I be allowed to take the oath so that I can practise Law in my home state.

Respectfully submitted,

JOSEPH L. DROCIAK
Attorney at Law

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#12
September 23, 1977

George S. Pappagianis
Clerk of Court and
Reporter of Decisions
The State of New Hampshire Supreme Court
Supreme Court Building
Concord, N.H. 03301

Dear Mr. Pappagianis:

Thank you for yours of September 16, 1977. Would you please inform me on what grounds my request for admission to the New Hampshire Bar was denied, and what measures I would have to take in order to be admitted.

Very truly yours,

JOSEPH L. DROCIAK
Attorney at Law

JLD/at

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Other Relevant Letters:

#13
[Letterhead of Jon Groetzinger, Jr.]

June 20, 1980

Ralph H. Wood, Clerk
New Hampshire Supreme Court
Supreme Court Building
Concord, NH 03301

Re: In re Joseph L. Drociak
No. 79-323

Dear Mr. Wood:

As you suggested in a telephone

conversation of June 16th, we are writing to elaborate on petitioner's reasons for requesting reconsideration by the Court of its decision in the above-captioned matter. You indicated that such elaboration could be submitted in letter form. We therefore request that the content of this letter be incorporated by reference in and as a part of petitioner's filings to date.

Petitioner had requested a hearing prior to being denied admission to the bar if there were any facts in dispute. Willner v. Committee on Character and Fitness, 373 US 96, 10 L ed 2d 224 (1963). The facts, however, do not appear to be in dispute and petitioner would be agreeable to submitting a Stipulation of Facts if the Court were to allow him to do so. Petitioner seeks such a stipulation or, if necessary, a hearing to establish a record and findings of fact for the purpose of taking an appeal to the U.S. Supreme Court. He has decided to take the appeal only after lengthy discussions and research. The method of stipulating to facts has been used in appeals in similar situations. Equitable Life Assur. Soc. v. Commissioner, 321 US 560, 561, 88 L ed 927, 929, reh den 322 US 767, 88 L ed 1593 (1944); Wilson v. Wilson, 416 F Supp 984, aff'd 430 US 925 (1977).

The grounds upon which petitioner intends to seek an appeal include, but are not limited to, the following:

I. Residency Requirement.

A. Constitutionality of Statute and Rules.

As stated in the Supplementary

Memorandum of Law, petitioner challenges the constitutionality of the residency requirement for admission to the New Hampshire bar contained in RSA 311:2 and rules issued pursuant thereto as violative of the Privileges and Immunities Clause of the U.S. Constitution, Art. IV, sec. 2, cl. 1. The constitutionality of such requirement under Art. IV is very much in question at present. The New York Court of Appeals recently held its residency requirement violative of the Privileges and Immunities Clause. Matter of Gordon, 48 NY 2d 266, 397 NE 2d 1390 (1979). However, on May 29, 1980 Judge Doyle of the Wisconsin Federal District Court disagreed with the New York decision and upheld Wisconsin's residency requirements against a Privileges and Immunities challenge, based upon Wilson v. Wilson, 416 F Supp 984, aff'd 430 US 925 (1977). Canfield v. Wisconsin Board of Attorneys Professional Competence, 48 USLW 2793 (June 10, 1980). See also Golden v. State Board of Law Examiners, 452 F Supp 1082, 1093 (USDC Md 1978) for a similar holding.

B. Unconstitutional Application of Statute and Rules.

Even if the statute and rules themselves do not infringe upon the Privileges and Immunities clause, the manner in which they were applied to petitioner unconstitutionally deprived him of equal protection and due process of law under the federal constitution. The statute and rules only require New Hampshire residency on application to take the bar examination, not on the date one is sworn in. Petitioner was a New Hampshire resident essentially from birth until well after he had passed the bar

examination. He had thus fulfilled the residency requirement and should not be deprived of the right to be admitted on account of the fact that he subsequently became a California resident.

II. Time Requirement.

Petitioner believes he has been denied his federal rights to due process and equal protection by the Court's ruling that too much time elapsed between his having passed the bar examination and his request to take the oaths. As was established in Mr. Shovan's Affidavit, the Court's policy in 1961 was that an applicant who had successfully passed the bar examination could return at any time to take the oaths and be admitted, so long as he was a New Hampshire resident. Mr. Drociak attempted to take the oaths in 1962; however, he was discouraged when Mr. Shovan again told him that he could not be sworn in unless he was a New Hampshire resident, which he was not at the time.

Based upon Mr. Shovan's assurance that he could take the oaths at any time and the perception that he had to be a New Hampshire resident, petitioner waited until September 1977 to again request admission. However, some time during this period the Court apparently changed its policy to require that one be sworn in within "several years" after passing the bar examination. Petitioner was never informed of this change nor of the consequences if he failed to take the oaths within a certain number of years. Nor was he ever informed of the reasons for such a policy change. In April 1980 the Court published its amendment to Rule 42 to require that the

oaths be taken within two years after passing the examination. Petitioner first learned of the change in policy around this time. Without any prior notice peitioner was thereby informed that his right to take the oaths was precluded.

Even if he had had prior notice of the change in policy, which he did not, the requirement that he be sworn in within "several years" would have been so vague as to prevent any reasonable person from determining the time limit within which to take the oaths.

*****

Petitioner respectfully requests that the Court in its reconsideration review the comments above in addition to matter previously submitted.

We look forward to hearing from you. If the Court reaffirms its ruling, we would appreciate the opportunity to submit a proposed Stipulation of Facts.

Thank you again for your attention in this matter.

Very truly yours,
[Jon Groetzinger, Jr.]
Jon Groetzinger, Jr.

[Michael G. Gfroerer MGG/JGJ]
Michael G. Gfroerer
Attorneys for Petitioner

JGJ/ld
cc: Joseph L. Drociak, Esq.
The Honorable George O. Shovan

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#14
[Letterhead of N.H. Supr. Court]

1979
November 14

Jon Groetzinger, Jr., Esq.
1 North Main Street
Derry, NH 03038

Richard G. Gfroerer, Esq.
Barto and Gfroerer
6 Loudon Road
P.O. Box 468
Concord, NH 03301

Gentlemen:

Re: 79-323 In re Joseph L. Drociak

The supreme court has referred to the committee on character and fitness Joseph L. Drociak's motion to take oaths, exhibits, and memorandum of fact and law.

The committee will communicate with you as soon as is practicable.

Very truly yours,
[George S. Pappagianis]
George S. Pappagianis

GSP/jd
cc: [members of the committee]

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#15
Constitutional Provisions, Statutes and Rules Involved:

Constitutional Provisions:
Article IV, Section 2, Clause 1,
United States Constitution:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Fourteenth Amendment, Section 1, United States Constitution:
"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes:
Chapter 311, Sec. 2, N.H. Revised Statutes Annotated (1961):
"Any citizen of the age of twenty-one years, of good moral character and suitable qualifications, on application to the Supreme Court shall be admitted to practice as an attorney."
(Statute has been amended, but without effect on this case to read:
"Any citizen of the age of eighteen years, of good moral character and suitable qualifications, on application to the supreme court shall be admitted to practice as an attorney.")

Chapter 311, Sec. 7, N.H. Revised Statutes Annotated (1980):
"No person shall be permitted commonly to practice as an attorney in court unless he has been admitted by the court and taken the oath aforesaid." [Text of oath is set forth in RSA 311:6].

Rules:
N.H. Supreme Court Rule 15 (1961):
"Any person who is a citizen of the United States and who is either a resident of the State of New Hampshire or

files a statement of intention to reside in the State of New Hampshire, shall be eligible to apply for examination provided he is possessed of the qualifications hereinafter provided."
[Rule 15 has been amended and renumbered; however, except for the abolition of the admission on motion procedure, the changes are without effect on this case:
"Rule 42 (1): All admissions to the bar shall be by examination only...."

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"(3): Any person domiciled in the United States and who either is a resident of the State of New Hampshire or files a statement of intention to reside in the State of New Hampshire shall be eligible to apply for examination provided he is possessed of the qualifications hereinafter provided.

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"(8) Except upon approval of the supreme court for good cause shown, the oath of admission required by RSA 311:6 must be administered within two years from the time the applicant has been notified of the successful passing of the bar examination or said examination must be taken again and passed."]